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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. CARL STANLEY BROWN, Defendant and Appellant.	B211202 (Los Angeles County Super. Ct. No. VA 071021)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dewey Lawes Falcone, Judge. Reversed and remanded.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

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In *People v. Brown* (June 25, 2004, B166415), a nonpublished opinion, we affirmed the judgment convicting appellant Carl Stanley Brown of second degree robbery and petty theft with a prior. Following our opinion and a denial of review by the California Supreme Court, appellant filed a petition for a writ of habeas corpus in the United States District Court for the Central District of California. That petition was successful and led to a second trial for appellant. The error we address in this opinion occurred during the second trial.

Appellant was convicted in his second trial of robbery and burglary, both in the second degree, and one prior strike; he was sentenced to a prison term of 11 years. As was true of his first trial, his conviction is based largely on the testimony of Richard Rojas, a loss prevention officer for a Wal-Mart store where these crimes were committed. The order issued by the United States District Court that granted appellant's petition for a writ of habeas corpus found that Rojas manufactured evidence and then lied about it during his trial testimony in the first trial. This became known only in the posttrial proceedings during the motion for a new trial following the first trial. It also found that the evidence impeaching Rojas's credibility was material and that there is a reasonable likelihood that it would affect the judgment of the jury. In the second trial, Rojas again testified but the evidence that impeached his credibility was not admitted. We reverse and remand with directions for a new trial that complies with the terms of the order of the United States District Court.

FACTS

We summarize the facts as they were developed at the second trial.

Rojas's duties included identifying and detaining shoplifters. He was working at a Wal-Mart store on May 11, 2002, when his attention was drawn to appellant because appellant had an open backpack in his shopping cart; the backpack was unzipped and "looked very floppy." Rojas testified that he saw appellant place Wal-Mart merchandise in the backpack; these items were men's clothing, a drill set and a baseball cap. Rojas testified that he watched as appellant left the store without paying

for the merchandise. Rojas stopped appellant and detained him with the help of Kaipo Doctolero, a Wal-Mart cashier.

Doctolero also testified. According to him, as he arrived for work on May 11, 2002, he saw appellant walking out of the store, carrying a backpack, followed by Rojas. Rojas asked appellant to stop, "stated that he was store security, and identified himself with his badge." Appellant "threw a punch" at Rojas and "attempted to run." Rojas and appellant started scuffling. Doctolero came to Rojas's aid and helped him to hold appellant down and place appellant in handcuffs. Afterwards, Doctolero saw items of Wal-Mart merchandise in the backpack, including a drill and a baseball cap. On cross-examination, Doctolero added that he did not see appellant conceal the items of merchandise.

Sheriff's deputies responded to a call from Wal-Mart and arrested appellant.

Appellant represented himself and took the stand as the first defense witness. Appellant admitted that he had multiple prior convictions for robbery and theft.

Appellant testified that before he entered the store he purchased some tools from a man he saw in a truck on the street. The tools included two drills, for which he paid $50 each. He knew a drill cost "significantly more than" that, but he did not think he was buying stolen property. He brought the items into the store and waited in line at the customer service area, intending to exchange the items for cash. When he reached the front of the line he took the items out and placed them on the counter. The store employee would not give him cash because he did not have a receipt. She was willing to give him a store credit, but her scanner could not read the bar codes on the items, so she asked him to wait for a manager. He grew impatient while waiting, put the items back into the backpack, and walked out of the store with the backpack and the items. Rojas suddenly tackled him, without warning. Rojas and Doctolero jumped on his back and held him to the ground. He was placed in handcuffs and turned over to sheriff's deputies. He never saw his property again. He testified that he saw

nothing wrong with purchasing the items outside the store and trying to make a profit by returning them to the store.

PROCEDURAL HISTORY

1. The Photograph

The photograph that became the bane of this case surfaced on the day that the jury was impaneled for the first trial. In a telephone conversation with Deputy District Attorney Phillips, Rojas stated that he thought he had photographs of the recovered merchandise. This was the first that the prosecution heard of photographs. Appellant, who represented himself during the first trial, objected. The next day, when trial commenced, the court overruled the objection to the photograph,[1] stating that the defense investigator could help appellant examine the photograph and that appellant could cross-examine Rojas about the photograph. In the end, Rojas testified that he took the photograph on May 11, 2002, the day of the incident with appellant.

A troublesome aspect of the photograph was that it showed a drill with a cord. According to Rojas, once he had secured the merchandise that appellant had taken, he had the cashier run a receipt for the merchandise. The receipt showed a cordless drill.[2] (Apparently this receipt was not disclosed until after trial commenced.)

But this was only the beginning when it came to the photograph. In the motion for a new trial, appellant was able to show that the numbers "090249501" that appeared on the back of this Polaroid photo meant, according to the Polaroid Corporation, which had been contacted by the defense investigator, that the photograph had been taken after September 2, 2002, i.e., the first four digits of the sequence showed this date. Prosecutor Phillips, who also contacted Polaroid, agreed

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[1] Actually, at this point there were two photographs showing the same subject matter.

[2] This was the second of two receipts. The first receipt showed only the clothing that had been taken and the backpack. As this was in error, a second receipt was prepared.

with this and stipulated with appellant that the film of the photograph was not manufactured until September 2002.

The items depicted in the photograph were not produced by the prosecution during the first trial.

2. The Defense Theory in the First Trial

Appellant did not testify in the first trial nor did he call any witnesses. His theory was in substance that the case against him was fabricated. Prior to the verdict, he pointed to the inaccuracies of the first receipt (see fn. 2, *ante*) and the fact that the second receipt showed a cordless drill while the photo was of a drill with a cord. In the motion for new trial, the fabrication theory was augmented by the argument that the photograph was also fabricated.

Appellant also requested that the court instruct the jury in terms of CALJIC No. 2.28 on the untimely disclosure of evidence without lawful justification. This request was denied.

The trial court denied the motion for a new trial on the mistaken assumption that Rojas had not testified about the date that he took the photograph.

3. The First Appeal

We state here our holdings in the first appeal.

First. We rejected the contention that the failure of the prosecution to produce the items during trial that appellant had allegedly taken deprived appellant of material exculpatory evidence.

Second. We held that appellant's due process rights were not violated because of the belated disclosure of the photograph and the second receipt.

Third. We agreed with the trial court's decision not to give CALJIC No. 2.28. We stated that the "real question is whether it is significant that appellant was deprived of the opportunity to impeach Rojas with the date the film was manufactured." (*People v. Brown, supra*, B166415.) We concluded that this was neither significant nor prejudicial under *Chapman v. California* (1967) 386 U.S. 18 because the

photograph was not an important part of the prosecution's case. We concluded that this was so because Rojas's testimony about the incident was complete without the photo and to some extent his testimony was corroborated by Doctolero and the arresting sheriff's deputy.

4. False Testimony

The prosecution is constitutionally required to report to the defendant and to the trial court whenever a government witness lies under oath. This principle is based on *Mooney v. Holohan* (1935) 294 U.S. 103 (*Mooney*) and *Napue v. Illinois* (1959) 360 U.S. 264, 269-272 (*Napue*) and has been articulated into three elements. To prevail under these cases, the defendant must show that (1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) that the false testimony was material. (*U.S. v. Zuno-Arce* (9th Cir. 2003) 339 F.3d 886, 889.) A new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury. (*Giglio v. United States* (1972) 405 U.S. 150, 154.)

We will refer to this as the *Mooney-Napue* issue.

5. The Petition for a Writ of Habeas Corpus in the United States District Court

Some time after our decision in the first appeal became final, appellant, after unsuccessfully filing two petitions for a writ of habeas corpus in California state courts, filed a petition for such a writ in the United States District Court for the Central District of California.

In November 2007, a federal magistrate judge submitted a report (the magistrate's report) that recommended granting of the petition. The magistrate's report recommended granting of the petition on the ground the motion for new trial should have been granted. It found that our prior opinion "was an objectively unreasonable application of [United States] Supreme Court law," and our factual determinations "were unreasonable in light of the record."

Applying the *Mooney-Napue* test, the magistrate first found that Rojas testified falsely about the photograph. The magistrate based this finding on a review of Rojas's trial testimony, which is set forth in relevant part in the magistrate's report. In that testimony, Rojas states twice that he took the photograph on the day that he recovered the merchandise from appellant's backpack. The magistrate then cited the evidence that the Polaroid film in question was manufactured in September 2002. The items that appellant had allegedly taken on May 11, 2002, were not available after that day. The magistrate concluded that "Rojas did not photograph the items he saw [appellant] take." The magistrate also found that the state knew the testimony was false, at least as of the time of the motion for a new trial.

The decision stated:

"'Deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice."' *Giglio v. United States*, 405 U.S. 150, 153, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) (quoting *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S. Ct. 340, 79 L. Ed. 791 (1935)). '"The same result obtains when the State, although not soliciting false evidence allows it to go uncorrected when it appears."' *Giglio*, 405 U.S. at 153 (quoting *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)). 'When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule.['] *Giglio*, 405 U.S. at 154 (citation omitted); *see Napue*, 360 U.S. at 269 ('The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness.')"

Citing *Banks v. Dretke* (2004) 540 U.S. 668, 700-701, and *Kyles v. Whitley* (1995) 514 U.S. 419, 444, the magistrate noted that whether there is a reasonable likelihood that the false evidence affected the judgment of the jury usually depends on whether there is independent, corroborating evidence and on the emphasis that the

prosecutor placed on the witness's testimony. The magistrate found that there was no independent evidence corroborating Rojas's testimony as to the actual, alleged taking of the merchandise inside the Wal-Mart store and that the prosecutor emphasized the importance of Rojas's testimony. The magistrate found that "Rojas was the witness whose reliability was determinative of guilt or innocence" and that the evidence impeaching his credibility was important and material.

The magistrate recommended that the court issue a conditional writ of habeas corpus that directed respondent to discharge appellant unless the State of California elected within 90 days to retry appellant.

In March 2008, the district court adopted the magistrate's report and recommendation, granted a conditional writ of habeas corpus, and ordered appellant's discharge unless he was promptly retried.

Appellant was retried in August 2008.

6. The Second Trial

We summarize the proceedings to the extent that they relate to the photograph.

(a) Pretrial Proceedings

When appellant returned to Judge Falcone's court for retrial, Deputy District Attorney Lamb had replaced Phillips as the prosecutor. Appellant declined a plea bargain offer that included an immediate release from custody. He then filed numerous motions about Rojas's testimony and the magistrate's report, among which were motions to dismiss because the People could not conduct the second trial using false testimony from Rojas, and requests for judicial notice of the federal court's findings that Rojas committed perjury and fabricated evidence.

On July 3, 2008, the court denied a motion to exclude the testimony of Rojas and Doctolero, and advised appellant that he could cross-examine them to attack their credibility. Appellant complained that he had not been notified before the exhibits from the first trial were destroyed. The court observed that those exhibits were now unavailable to both sides.

On August 4, 2008, the court listed points it wanted appellant and Lamb to keep in mind during the trial. They were:

"THE COURT: First of all, there's to be no reference to the magistrate's findings. We've talked about this before, and I'm making an order. There's to be no reference to the magistrate's findings. This court is not bound by those findings. In opening statement and in closing argument or at any time during the trial, there is to be no reference to those magistrate's findings regarding the issues that you raised in your habeas.

"MR. BROWN: Okay.

"THE COURT: Number two, no reference to the so-called loss of physical evidence. Whatever evidence was presented during the trial has been destroyed. All that evidence presented during the trial as exhibits in this trial -- the prior trial, rather -- have been destroyed under the order of the clerk's office because of the fact that all the appeals have been exhausted in the state court level. . . . It's not available through no fault of either side. It's just a rule of law that takes place when the appeal has been exhausted in the state court level. [¶] Yes, sir?

"MR. BROWN: Let me understand something, Your Honor. You're saying that I cannot impeach the witness with the photograph? Is that what you're saying?

"THE COURT: I'm not saying that at all. I'm not saying that at all. Whatever you have, you can impeach the witness with. I'm not sure what you're talking about. I merely made reference to the actual exhibits, whatever they were in the trial court. . . . [¶] . . . [¶]

"Thirdly, any questions addressed to any witnesses, no reference that did you lie or did you not lie or commit perjury or anything like that. You have the absolute right to impeach the credibility of any witness, but I don't want the words 'perjury' or 'lies' or anything like that used in questioning a witness. You go about that in a different format by asking them questions that are either inconsistent or consistent that would establish or jeopardize their credibility . . . ."

The court also ruled that instead of referring to a "prior trial," appellant and Lamb should use the words "prior proceeding."

Appellant complained that he felt he was "being handcuffed here." The court responded that if its rulings were wrong, they would be reviewed.

Appellant later asked if he could use the stipulation he made with Phillips at the hearing on the motion for new trial. The transcript of those proceedings showed that the stipulation stated, "the film part of the photograph [was] not manufactured by Polaroid until September of 2002." Lamb objected that he was "not stipulating to anything," was "not bound by any stipulation from a prior trial," and was "not even introducing any film." After further research and discussion, the court ruled that appellant could use the stipulation "for impeachment purposes." It later restated that ruling, indicating that "the stipulation that Ms. Phillips entered into at the motion for new trial in the prior trial in this case is a judicial admission and can be used appropriately by Mr. Brown in this case." Despite that ruling, appellant did not mention the stipulation during the second trial.

Lamb also was concerned that appellant would try to elicit hearsay from Phillips about what Polaroid told her. Resolution of that issue was postponed. The court repeated that there was to be no mention of destroyed evidence. If the subject came up, it would admonish the jury that the exhibits were destroyed due to court procedure, through the fault of neither side.

Appellant complained that he was being wrongfully precluded from impeaching Rojas's credibility with the photograph, even though false evidence had been used against him in the prior trial. The court responded that appellant could impeach Rojas's credibility, and he could refer to the photograph, but if he mentioned it, the court would give the admonishment. Lamb insisted that nobody could say the photograph was false unless an expert testified about it. The court responded, "I'm not going to let anybody say anything is false." It would allow no more than these questions: "'Did you take a picture? [¶] 'Yes. [¶] 'When did you take a picture? [¶]

'Such and such a date. [¶] 'Where is the picture?'" After that, it would tell the jury what happened to the picture.

(b) The Trial

The first time that the photograph was mentioned during the trial was on Doctolero's cross-examination when he stated that he did not see Rojas take a photograph of the merchandise.

The photograph was not mentioned during Rojas's direct examination. He testified that he saw appellant take items from the shelves, place them into the backpack, and leave the store without paying for the items. He followed appellant out of the store and identified himself as store security. Appellant swung at him, there was a scuffle, and he detained appellant with Doctolero's help.

On cross-examination, appellant first impeached Rojas with minor discrepancies between Rojas's trial testimony and his testimony at the preliminary hearing. Appellant then asked, "Mr. Rojas, isn't it true that you took a photograph of the items you said the defendant stole from Walmart?" Lamb objected. At bench, appellant explained that his next questions would be, "Isn't it true that you testified you took the picture on May 11, 2002?" and "Isn't it true that you actually took the picture at least four months after May 11, 2002?" The court decided that appellant could ask those questions, despite Lamb's insistence that the questions were irrelevant because the People were not introducing evidence of the photo.

Before the jury, the reporter reread the question, "Mr. Rojas, isn't it true that you took a photograph of the items you said the defendant stole from Walmart?" Rojas answered, "Yes." The questioning continued:

"Q BY MR. BROWN: And isn't it true that you testified in the prior proceeding that you took the photo on May 11, 2002?

"MR. LAMB: Objection, Your Honor, to the form of the question. The question should just be a direct question in this trial.

"THE COURT: That's right. So let's reframe your question, Mr. Brown.

"Q BY MR. BROWN: Isn't it true, Mr. Rojas, that you testified --

"THE COURT: No, no, no. [¶] Do you recall . . . the date you took that photograph? That's the question.

"THE WITNESS: Oh, I thought you were asking --

"THE COURT: No. I'm talking to you.

"THE WITNESS: Yes. Yes, I remember.

"THE COURT: And what date was it, do you believe, that you took those photographs of that item or those items?

"MR. BROWN: That's not the way I phrased the question, Your Honor.

"THE COURT: I know you didn't phrase it that way, but I am phrasing it the correct way. You can ask the next question. [¶] What was the date that you recall you took that photograph?

"THE WITNESS: *The same day of the incident.*

"THE COURT: All right. Go ahead, Mr. Brown.

"Q BY MR. BROWN: So then you testified that you took the photo on May 11, 2002; correct?

"A Yes.

"Q And isn't it true, Mr. Rojas, that you actually took the photo at least four months after May 11, 2002?

"THE COURT: 'Yes' or 'no?'

"THE WITNESS: No." (Italics added.)

Neither the trial court nor the prosecutor responded in any way to the testimony that had just been given.

During additional cross-examination, Rojas added that he previously had testified that the items in the photograph were the same items appellant concealed in the backpack. He denied that he photographed the items after he selected them "out of Walmart stock." He had no documents listing the items he recovered. The court gave the promised admonishment about neither side being at fault for destruction of the

evidence. Rojas then testified that he did not know when the film he used to take the photographs was manufactured, and he last spoke to law enforcement about the case on the day of the incident.

We have already summarized appellant's testimony. He was the first defense witness to testify.

Appellant's second and final witness was Phillips, the prosecutor from the first trial. She was questioned solely about the photograph. She was testifying in 2008, and her memory of many details from 2003 was "very cloudy." She refreshed her recollection with the transcript of the first day of the first trial, January 14, 2003. She then described how she first learned about the photograph from Rojas on January 13, 2003, she told that to the trial court on January 14, 2003, and she used the photograph at the first trial. She did not recall if she saw a number on the back of the photo at that time, but if she did, she would not have known what the number meant.

Appellant then asked, "Ma'am, did you explain to the court why you had not been delivered the pictures before January 14, 2003." Phillips said she did. Lamb objected that the question had been asked and answered. The court said the question was irrelevant, but it would allow the answer to stand. Appellant argued emotionally with the court about his belief that his question was relevant. The court had the jurors go to the jury room. It told appellant that, if he had been an attorney, he would have been held in contempt of court for talking to the court that way. After further discussion, the jury was brought back and admonished to base its decision on the evidence and the law.

Appellant next asked, "Ms. Phillips, after you had received the photographs from Mr. Rojas, did you conduct any investigation as to the date the film was manufactured?" Lamb's hearsay objection was sustained. The court told Phillips to describe only what she personally did. Phillips answered, "*After the trial, I called a representative from Polaroid*." (Italics added.) The court observed, "Now we are getting into hearsay, aren't we, whatever that person told you?" Phillips answered,

"Yes." The court asked, "So you did [you] call somebody from Polaroid?" Phillips answered, "Yes." *The court said, "All right. That's it*." (Italics added.)

Appellant tried to ask, "And did you learn that Polaroid --" Lamb's hearsay objection was sustained. Phillips again said she told the judge why she had not presented the photographs earlier. Appellant asked, "*And was your understanding of the photographs that they were taken on May 11, 2002?*" Phillips answered, *"Not necessarily, Mr. Brown.*" Appellant asked, "No, Ma'am?" Phillips answered, "No." Appellant asked Phillips what she understood about the photographs. A relevancy objection was sustained. She repeated that she was allowed to present them in the previous proceeding. The questioning continued:

"Q . . . And did you look at the back of the photos before you --

"A No, I don't believe that I did.

"Q You don't remember seeing a number on the back of the photos?

"A Mr. Brown, if I had seen that number at the time, it would have had no significance to me.

"Q Right, but you did see them at some time?

"A *I don't know that I did*." (Italics added.)

Appellant did not mention the stipulation about the date the film was manufactured. Instead, he asked:

"Q Well, you just stated that, had you seen the numbers on the back at a previous time, which indicates that you understood or you knew that there were numbers on the back of the photo later.

"THE COURT: No. I think her answer was that if she had. She did not indicate that, in fact, she had seen the back of that photograph."

The court reminded the jury that evidence was destroyed through the fault of neither side. The questioning continued:

"BY MR. BROWN: Ms. Phillips, the first four numbers on the back of the photograph corresponded with the month and year the film was manufactured; correct?

"MR. LAMB: Objection --

"THE COURT: Let me just hear the question, and don't answer. [¶] Go ahead. Your question again, Mr. Brown?

"Q BY MR. BROWN: The first four numbers stamped on the back of the photograph correspond with the month and year the photographs were manufactured?

"MR. LAMB: I object. Lack of foundation for this witness to testify to that.

"THE COURT: Sustained, as well as it would be hearsay.

"Q BY MR. BROWN: Ms. Phillips, did you know that the film was manufactured in September of 2002?

"MR. LAMB: Objection, again, Your Honor, and I would ask that counsel be advised to stop proceeding with this line of questioning.

"THE COURT: We have really covered this issue very thoroughly. The objection is sustained. [¶] Go ahead, Mr. Brown.

"Q BY MR. BROWN: Ms. Phillips, are you aware that this is a court-ordered re-hearing on these charges?

"THE COURT: Sustained. [¶] I just admonish the jury not to pay any attention to that question. When a question is asked and I sustain the objection, do not speculate as to what the answer was --

"MR. BROWN: No further questions from this witness, Your Honor."

Thus, when Phillips's testimony was over, the state of the record was that Rojas had again testified that he took the photograph on May 11, 2002, and there was *no evidence to the contrary.* In other words, the false testimony that led to the judgment of the district court granting appellant's petition for a writ of habeas corpus had been presented at the second trial, as well.

No other witnesses testified. Lamb did not mention the photograph during final argument. He relied on Rojas's observations, Doctolero's corroboration of Rojas, and the unbelievable nature of appellant's version. Appellant argued that he did not commit any crime, as he purchased the items from the man in the truck and did not use

force until Rojas knocked him to the ground. He mentioned the photograph only to say that it made "absolutely no sense" that Rojas took a photo of the property and did not turn it over to the arresting officer.

DISCUSSION

1. Reversal Is Warranted Based on a Mooney-Napue *Violation*

The parties spend a great deal of effort arguing about the murky legal issue of whether the factual findings in the United States District Court's order should have been introduced at trial under the doctrine of res judicata or collateral estoppel. We find it unnecessary to resolve that issue because we find reversal is clearly warranted for the reason previously pointed out by the United States District Court when it granted Brown's petition for writ of habeas corpus in the first instance.

The writ was granted because the United States District Court found that materially false evidence -- Rojas's testimony that the photograph was taken on the day of the shoplift on May 11, 2002 -- *was admitted without correction in trial*. In fact, the People stipulated the film used to take the photograph was not manufactured until September 2002. We noted at the outset of the opinion that the United States District Court, citing United States Supreme Court precedent, stated:

"'Deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice."' *Giglio v. United States*, 405 U.S. 150, 153, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) (quoting *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S. Ct. 340, 79 L. Ed. 791 (1935)). '"The same result obtains when the State, although not soliciting false evidence allows it to go uncorrected when it appears."' *Giglio*, 405 U.S. at 153 (quoting *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959))."

When Rojas again testified that he took the photograph in May 2002, the People were obligated to see to it that in some manner -- by judicial notice, stipulation or the introduction of evidence -- the jury was aware of the controversy surrounding the date of the photograph. That did not happen. As a result, the jury again heard the case

without the evidence that the United States District Court ruled must be considered as a matter of due process.

We do not believe the error was harmless. First, the United States District Court found the error was not harmless. While the evidence presented in this second trial was different, it provides an even more compelling basis for finding that the evidence might have impacted the verdict. Indeed, the United States District Court found exclusion of the impeaching evidence might have affected the verdict after the first trial wherein appellant presented no evidence in his defense, except that the prosecutor's evidence was fabricated. In this second trial, appellant not only presented evidence that the prosecution's evidence was fabricated, he also provided a defense version of the facts that explained why he was found in possession of the allegedly stolen merchandise.

For this reason, under *Mooney* and *Napue*, the judgment must once again be reversed.

2. Counts 3 and 4

After appellant testified at the second trial, the court permitted the prosecutor to add count 3, second degree burglary, and count 4, receiving stolen property. The jury found appellant guilty on count 3 and not guilty on count 4. The trial court later stayed count 3 pursuant to Penal Code section 654. Both sides agree that the addition of counts 3 and 4 was barred by the statute of limitations. In the ensuing new trial, appellant can only be charged with counts 1 and 2, the original two counts.

3. Remand with Directions

We remand with directions for a new trial. If Rojas is called as a witness, the jury must be made aware that Rojas testified on two separate occasions under oath that he took the photograph on May 11, 2002. The jury must also be made aware that the photograph was not taken on May 11, 2002, but was in fact taken in or after September 2002 and that Rojas's testimony to the contrary was false.

We add here that, other than so informing to the jury, upon a retrial of this case the jury need not be informed of the district court's judgment or the magistrate's report incorporated in that judgment or about the petition that led to that judgment. There is therefore no need for judicial notice.

Because we reverse and remand with directions for a new trial, it is unnecessary to address the balance of appellant's contentions.

DISPOSITION

The judgment is reversed and the case is remanded for a new trial consistent with the views and directions set forth in this opinion.

FLIER, Acting P. J.

We concur:

BIGELOW, J.

MOHR, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.